

Barry C. Scheck, Esq.
Peter J. Neufeld, Esq.
Directors

Maddy deLone, Esq.
Executive Director

Innocence Project
100 Fifth Avenue, 3rd Floor
New York, NY 10011

Tel 212.364.5340

Fax 212.364.5341

www.innocenceproject.org

August 20, 2010

Texas Forensic Science Commission
c/o Leigh M. Tomlin, Commission Coordinator
Sam Houston State University
College of Criminal Justice
Box 2296
816 17th Street
Huntsville, Texas 77341-2296

BY EMAIL TO THE COMMISSION AND INDIVIDUAL COMMISSIONERS

Dear Texas Forensic Science Commissioners,

Thank you for the opportunity to supplement the record before you with regard to the Willingham/Willis allegation.

First and foremost, it is important that the Texas Forensic Science Commission (Commission) recognize that the Innocence Project has alleged that the Texas Fire Marshal's Office (FMO) committed professional negligence by failing to inform the Texas criminal justice system¹ that:

- the arson analyses the FMO had previously provided to it had been proven unreliable, and
- the national fire investigation community had universally accepted National Fire Protection Association Code 921 (NFPA 921) as the only scientifically acceptable means of analyzing fires to determine if such fires had been set.²

The FMO's failure to inform the criminal justice system, which statutorily relies upon the FMO for evidence of arson,³ had the result of preventing the courts, the Board of Pardons and Parole, and the Governor from consistently understanding that they must not rely upon the discredited arson findings when considering cases at trial, pre-trial, or post-conviction. Had the FMO properly notified those parties:

¹ Throughout this document, the "Texas criminal justice system" means all parties who make decisions on behalf of the government in fire-related criminal proceedings.

² See Letter from Innocence Project to the Commission, dated August 13, 2008.

³ See Tex. Gov't Code § 417.007.

- prosecutors would understand the propriety of the arson evidence presented to them and act appropriately in all cases for which they are responsible;
- judges could understand the unreliability of such evidence when presented to them;
- the Board of Pardons and Paroles could consider such facts as part of their pardon and parole considerations; and
- the Governor could consider such facts when determining whether or not to allow the execution of a person who had been convicted, and/or whether to provide another form of clemency, when presented with a petition noting the impropriety of such evidence.

Second, the Innocence Project has alleged that, NFPA 921 notwithstanding, the fire investigators involved in these cases committed professional negligence by failing to conform their investigations and testimony to the standard of practice of the day. The fire investigators in question may not have been “scientists,” but they knew that their analyses:

- Were being relied upon by the Texas justice system for determinations regarding whether or not a fire had been set;
- Were critical to assessments of innocence or guilt by the triers of fact in arson cases; and
- Could have the effect of sending any given defendant to prison for many years, or even result in that person’s execution.

Therefore, while these people may have been but simple fire investigators, i.e. not scientists, they still had a duty to understand if their methods for ascertaining arson were understood by their profession to be unreliable. Because it seems clear on its face that the Willingham and Willis fire investigators were negligent in their responsibility to understand the propriety of the methods they used to determine whether a fire had been set, it is critically important that the Commission investigate and further consider this question.

Finally, the testimony of the FMO’s investigator in the Willingham case was patently inappropriate, and as such represented negligence or misconduct on the part of an agent of the FMO.

These allegations of negligence and/or misconduct call into question the reliability and validity of arson investigations and convictions - past, present and future - across Texas. As such, they demand your review as they are allegations of “professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity.”⁴

Background

The Statutory Responsibilities of the Texas Fire Marshal to the Texas Criminal Justice System
Pursuant to Texas law, the Texas Fire Marshal is the “chief investigator in charge of the investigation of arson and suspected arson in the state.”⁵ Also according to statute, the Texas Fire Marshal “may administer oaths and compel the attendance of witnesses and the production of documents.”⁶ “If the state fire marshal believes that there is sufficient evidence to charge a

⁴ Tex. Gov’t Code § 38.01(4)(a)(3).

⁵ Tex. Gov’t Code § 417.004 (emphasis added).

⁶ Tex. Gov’t Code § 417.007(d).

person with arson, attempted arson, conspiracy to commit fraud, or another offense related to the matter under investigation, the state fire marshal ***shall give to the appropriate prosecuting attorney all evidence and relevant information that has been obtained***, including the names of witnesses...The state fire marshal ***shall assist in the prosecution of any complaint he files.***⁷ It is therefore beyond question that the Texas Fire Marshal has a clear statutory duty to the Texas criminal justice system, and specifically to prosecutors considering violations of criminal law.

The Cases that Establish Professional Negligence or Misconduct that Would Affect the Integrity of Forensic Results

Both Ernest Willis and Cameron Todd Willingham were convicted of capital murder based on outdated and disproven arson analyses. Both convictions resulted from arson analyses supported by the FMO, which provided investigative support for local fire departments. In both cases, an investigator from the FMO testified to his conclusion: that the fire at issue was set.

Both men spent years in prison because of flawed investigations and testimony for which the FMO was responsible. Both men languished behind bars despite the fact that fire science had demonstrated the significant flaws in past traditional forms of analysis. In both cases this was because the FMO did not alert the Texas criminal justice system that the underlying testimony supporting the arson convictions was dubious.

Where these cases differ is in their outcomes. In one of these cases – despite the failures of the FMO – the man sentenced to death for arson/murder based on an unreliable arson analysis had his conviction vacated, and was compensated on the basis of “actual innocence” by the state of Texas. That justice resulted not from the FMO’s actions, but despite its inaction. The prosecutor, Ori White, preparing for re-trial, realized the impropriety of the original arson analysis and himself moved for justice.

In the other case – because of the failure of the FMO to inform the Texas Court system – neither the prosecution, judges, Board of Pardons and Paroles, or Governor’s office itself learned or accepted the fact that the arson analysis relied upon to determine his guilt was unreliable. Thus none of them stopped – or even seriously questioned the propriety of – Mr. Willingham’s execution.

Two very similar fires. Two very similar – and flawed – arson analyses led to conviction. In both cases the FMO had a duty to tell the courts of the unreliability of previously used arson analyses. In neither case did the FMO do so. In one case the court system – because of a responsible prosecutor’s action and despite the FMO’s failure to act – realized the mistake and exonerated an innocent man. In the other case, no government actors learned of the unreliability of the evidence from the FMO or elsewhere, and the Texas criminal justice system allowed this man to be executed, despite there being no reliable evidence of his guilt.

These cases exemplify the problem we put before you in our May 2006 complaint, a problem that you as a commission are empowered to investigate and correct: that hundreds of Texans may be behind bars based upon faulty arson science.⁸ In fact, this allegation could have been brought in the name of Ed Graf, Alfredo Guardiola or any of the estimated 250 to 400 people in Texas

⁷ *Id.*

⁸ Dave Mann, *Fire and Innocence*, Texas Monthly, Dec. 2009 <<http://www.texasobserver.org/cover-story/fire-and-innocence>> (last visited Aug. 19, 2010).

prisons on bad arson science.⁹ While this allegation revolves around the cases of the two men, Ernest Willis and Cameron Todd Willingham, it is about far more than them. This allegation is about the discredited arson analyses that have been used for nearly two decades to determine innocence or guilt of arson and related charges in the Texas court system, and the injustices that persist to this day because the FMO has consistently failed to clearly inform the Texas criminal justice system that the arson investigation community had universally accepted that the old “folklore-based” fire investigation analyses had been discredited, were unreliable, and had improperly affected determinations of innocence or guilt.

Analysis

A. *The Fire Marshal’s Office’s Duties to Correct and Inform*

Pursuant to our allegation as detailed in our August 13, 2008 letter to the Commission, your investigation should be focused primarily on whether the FMO:

- 1) should have been aware of NFPA 921 when it was promulgated in 1992;
- 2) should have substantially revised its arson analysis procedures thereafter to reflect scientific findings of NFPA 921;
- 3) should have taken into account NFPA 921 once its effect was clear on the Willingham case and subsequent cases; and
- 4) should have notified prosecutors and courts about the substantial change in forensic arson analysis brought about by NFPA 921 at whatever point after Mr. Willingham’s conviction the FMO adopted the tenets of NFPA 921 and concluded that the analysis offered by its agents in the Willingham case and other similar matters lacked scientific merit.¹⁰

In summary, we suggest that the true question for the Commission to consider in this regard is whether or not the FMO has been negligent, or committed misconduct, by failing to inform the Texas criminal justice system, or any specific entities therein, of the unreliability of the discredited arson analyses it had previously submitted to it.

The Commission has already rightly determined that, when considering whether negligence or misconduct had occurred, it is not bound by any one definition of negligence or misconduct,¹¹ but will instead allow the common understanding of those terms to, along with Commissioners’

⁹ *See Id.*

¹⁰ *See p. 2, Letter from Innocence Project to the Commission dated August 13, 2008.*

¹¹ While Chairman Bradley presented the Commission with his recommended definitions of these terms at your first meeting under his Chairmanship, the Commission expressed strong reservations about being bound to such definitions (particularly without the benefit of the only other Commissioner-lawyer being in attendance when those definitions were considered), and while definitions were ultimately included in the voluntary policy and procedures guidelines that you accepted by the end of that meeting, the Commission accepted them only after having clearly established that it would not be bound by them:

“Adams: I have a question on the spirit of these policy decisions here. Are these going to be rules, laws or guidance?”

Bradley: They are neither of the first two, they are not rules because we don’t have rulemaking authority. They’re not laws because only the legislature can do laws.

Adams: I just want it to be clear.

Bradley: They are—guidelines is another good word. I use the words “policies and procedures.” They help us discipline ourselves. They do not reach out to any other agency or tell them how to behave. And they’re not even enforceable on ourselves.” Unofficial transcript of January 29, 2010 Commission meeting, transcribed by Zev Averbach, Averbach Transcription, 928 Broadway, Suite 504, New York, NY 10010.

Benjamin N. Cardozo School of Law, Yeshiva University

professional expertise, guide its assessments of professional negligence or misconduct in the forensic setting.

To that end, it may be helpful to keep in mind the common law finding of negligence, then, which, according to well established Texas law, rests primarily upon the existence of reasons to anticipate injury and the failure to perform the duty arising on account of that anticipation.¹²

We examine the elements of such an analysis, as applied to this allegation, below.

1. The Fire Marshal's Office knew or should have known of NFPA 921.

The FMO was or should have been aware of NFPA 921 when it was promulgated, and ultimately generally accepted, as the standard for arson investigations by the fire investigation community. Indeed, FMO regulations, adopted in 1996, recognize the fact that “the [National Fire Protection Association (NFPA) is] a nationally recognized standards-making organization.”¹³ What’s more, the FMO has incorporated NFPA standards into its regulatory scheme.¹⁴ Given the preeminence of the NFPA, the FMO clearly knew - or at the very least, should have known - about NFPA 921 upon its publication in January 1992. Further, the FMO’s leadership responsibility to the court system¹⁵ on fire-related issues is written into Texas law; as such, the state statutorily relies upon the FMO to remain abreast of significant developments in its field of expertise, and to act accordingly. Given that NFPA 921 represents a clear and absolute departure from the old, discredited and unreliable “folklore” based method of determining if a fire had been set – and that those “folklore” forms of analyses had individually and specifically been discredited separate from NFPA 921 – the FMO had a duty to inform the Texas criminal justice system of the change in accepted professional practice.

Indeed, evidence of NFPA 921’s acceptance abounded in the 1990s, in Texas and nationwide. Corsicana Fire Chief Donald McMullan, for example, acknowledges that it is “probably true” that the NFPA 921 was well established by 1995, and universally acknowledged some three years later.¹⁶ When the National Fire/Arson Scene Planning Panel first met *in April 1998*, it “determined that [its work] **should not attempt to supplant those widely accepted consensus documents** [referring to NFPA 921 and standards E1188 and E860 from the American Society for Testing and Materials] but should supplement them for those public safety personnel who may not be trained in the specialized aspects of fire scene investigation but may be in the position of having to respond to a fire/arson scene.”¹⁷ In the year 2000, the International Association of Arson Investigators formally endorsed the adoption of the 2001 edition of NFPA 921.¹⁸ In light of all the above, the FMO knew or should be held to have constructive knowledge of the universal acceptance of NFPA 921 by the fire investigation community by – at the very latest – 2000.¹⁹

¹² See, *inter alia*, *Great Atlantic & Pacific Tea Co. v. Evans*, 175 S.W.2d 249, 251 (Tex. 1943); *Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d 125, 130 (Tex.App.-Corpus Christi 1997); *Robinson v. Nat'l Autotech, Inc.*, 117 S.W.3d 37, 42 (Tex.App.2003--Dallas).

¹³ 28 Tex. Admin. Code § 34.302.

¹⁴ See 28 Tex. Admin. Code § 34.303.

¹⁵ See Tex. Gov't Code § 417.004.

¹⁶ Response of Corsicana Fire Chief to Leigh Tomlin, dated Sept. 29, 2009.

¹⁷ p. 8, *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel*, NIJ Research Report (June 2000).

¹⁸ p. 40, *Arson Review Committee Report on the Peer Review of the Expert Testimony in the Cases of State of Texas v. Cameron Todd Willingham and State of Texas v. Ernest Ray Willis*, May 2006.

¹⁹ Though see *infra* text accompanying note 21 that the FMO has used NFPA 921 for investigations since 1993.

2. The Fire Marshal's Office should have revised its procedures based on NFPA 921.

The FMO should have substantially revised its arson analysis procedures after it accepted NFPA 921 to reflect that acceptance. Indeed, there is evidence that the FMO did just this. When asked at a recent meeting of the Texas Criminal Justice Integrity Unit whether the FMO had adopted NFPA 921, Ed Salazar, Assistant Director of the State Fire Marshal's Office, responded that the FMO had not adopted it per se, but that it had been using NFPA 921 as a standard for fire investigations since 1993.²⁰

3. The Fire Marshal's Office should have taken into account NFPA 921 once its effect was clear on the Willingham case, the Willis case, and subsequent cases.

Given the Texas criminal justice system's justified reliance on the testimony of the FMO, and particularly Texas prosecutors' reliance on evidence and other information provided by the Fire Marshal as established by statute,²¹ the FMO should have taken into account the clear implications of NFPA 921 on the past arson analyses employed in the Willingham case and in other convictions where people were imprisoned and/or awaiting execution for arson, murder and other crimes based on those long-discredited, unreliable forms of arson analysis²² Specifically, the FMO should have recognized the danger of the unreliable methods previously used by fire investigators, educated the court system about that unreliability, and acted affirmatively to ensure that such unreliable analyses were no longer performed.

4. The Fire Marshal's Office should have notified Texas prosecutors, courts, the Board of Pardons and Parole, and the Governor's Office about the implications of NFPA 921.

Finally, the FMO should have notified Texas prosecutors, courts, the Board of Pardons and Parole, and the Governor's Office about the substantial change in acceptable forensic arson analysis brought about by NFPA 921. It should have done so at the time that the FMO adopted the tenets of NFPA 921; when it concluded that the analysis offered by its agents in the Willingham case and other investigations were unreliable; and/or when it realized the unreliability of each of the other "folklore-based" forms of ascertaining whether a specific fire had been set.

Again, **the FMO has a statutory duty under Texas law to "give to the appropriate prosecuting attorney all evidence and relevant information that has been obtained"** when he believes that "there is sufficient evidence to charge a person with arson, attempted arson, conspiracy to commit fraud, or another offense related to [a] matter under investigation."²³ As such, it is perfectly clear that the FMO has a statutory duty to the prosecution in criminal matters

²⁰ November 13, 2009 meeting of the Texas Criminal Justice Integrity Unit
<<http://www.cca.courts.state.tx.us/tcju/meetings.asp>> (last visited Aug. 19, 2010).

²¹ See Tex. Gov't Code §§ 417.004, 417.007 (setting out investigatory and prosecution-related duties of the FMO).

²² Again, this allegation is merely a vehicle through which to uncover and reinvestigate convictions based upon faulty arson science. As referenced above, this allegation could have been brought in the name of any number of inmates in Texas prisons. For instance, Alfredo Guardiola was convicted of arson the very same year the FMO began to use NFPA 921. *Fire and Innocence*, Texas Monthly, Dec. 2009.

²³ Tex. Gov't Code § 417.007 (emphasis added).

